

**DECISION**



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**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

**FILE:** B-201053; B-201397

**DATE:** May 18, 1982

**MATTER OF:** Marsh & McLennan; Alexander and Alexander  
of Texas, Inc./The Pueblo Agency

**DIGEST:**

1. Protest of award of contract by agency for Indian housing authorities is subject to GAO bid protest jurisdiction since Federal agency actually conducted the procurement and use of appropriated funds is at least initially involved.
2. Where basis of protest is improper evaluation of proposals by agency, rather than terms of solicitation, protest filed within 10 working days from time protester learned that it was not awarded the contract is timely.
3. Although solicitation did not clearly set forth evaluation factors, it did state that award would be made for the three types of insurance coverage solicited and that proposals offering a non-cancellation agreement were preferred. Consequently, an offeror who proposed only two of the three types of coverage sought and did not propose a non-cancellation agreement could not reasonably expect to be selected for award over an offeror who proposed all three types of coverage and a non-cancellation agreement with respect to the major type of coverage sought.
4. Offerors are entitled to know evaluation factors to be used by agency and whether procurement is intended to achieve minimum standard at lowest cost or whether cost is secondary to quality. Mere statement that "price and other factors" will be considered in award determination does not fully satisfy this requirement.

Marsh & McLennan protests the award of a contract to Corroon & Black/Dawson & Co., Inc. by the Department of Housing and Urban Development (HUD) on behalf of 152 Indian housing authorities. Alexander and Alexander of Texas, Inc./The Pueblo Insurance Agency also protests the award. The contract is for insurance and related services for Indian housing authorities receiving financial assistance from HUD. Marsh maintains that it was the low responsible offeror on two of the three types of insurance coverage being solicited and therefore should have received an award to provide such coverage. Alexander argues that it was the low responsible offeror for all three types of coverage and was the only offeror which fully complied with the Indian preference clause of the solicitation. HUD argues that we do not have jurisdiction over the protests and that in any event the protests are untimely and without merit. We conclude that the protests are properly for our consideration but find them to be without merit.

#### BACKGROUND

The Secretary of HUD is authorized by the United States Housing Act of 1937, as amended, (42 U.S.C. § 1437 et seq. (Supp. III 1979)), to provide financial and technical assistance to Indian housing authorities to aid them in the development and operation of low-income housing. See generally 24 C.F.R. Part 805 (1981). Financial assistance is provided to Indian housing authorities pursuant to an agreement known as an Annual Contributions Contract (ACC). Generally, under an ACC, Indian housing authorities agree to develop and operate low-income housing projects in accordance with HUD regulations. In exchange for this agreement, HUD agrees to loan the Indian housing authorities the funds necessary to construct housing projects or to guarantee loans obtained by housing authorities from private sources. HUD also agrees to make annual contributions to the housing authorities to reimburse them for the indebtedness (both principal and interest) incurred in building the projects. HUD further agrees to make additional annual contributions (also known as an operating subsidy) to assist the housing authorities in the operation and maintenance of their projects.

Among other things, Indian housing authorities are required by an ACC to carry various types of insurance including 1) fire and extended coverage on project property; 2) public liability and non-owned and hired automobile liability coverage; and 3) fidelity bond coverage on employees. To assist the housing authorities in meeting this obligation, HUD decided to obtain these three types of insurance on a "Master Policy" basis. Under a Master Policy, the insurer agrees to provide a given type of coverage for the participating Indian housing authorities at a premium specified in the Master Policy. Premium billings under the Master Policy are sent directly to each participating housing authority. A consolidated billing is then sent to HUD which remits payment on behalf of the housing authorities. HUD is later reimbursed by the housing authorities.

On August 15, 1980, HUD issued a solicitation to obtain insurance and related services for the Indian housing authorities under a Master Policy. The solicitation did not specifically require offerors to offer all three types of coverage. It advised offerors that HUD was seeking a non-cancellation agreement, but offerors were also informed that consideration would be given to a 120-day cancellation agreement in the event offerors could not offer non-cancelable coverage. The solicitation invited offerors to submit proposals offering coverage for a three-year period at a guaranteed rate on an annual installment or three-year prepaid basis. Offerors were also permitted to offer deductibles of \$0, \$100, \$250 or \$500 on the fire and extended coverage.

In addition, offerors were required to propose loss prevention and safety programs and to demonstrate their ability to develop and manage the programs. The solicitation provided that award would be made to the "responsible proposer whose proposal is in the best interests of the participating [Indian housing authorities] and HUD, price and other factors considered." The solicitation did not set forth any specific evaluation factors except it did state that material submitted regarding the loss prevention and safety program would be considered as a factor in the evaluation of proposals. The solicitation further provided that the proposals would be publicly opened and that the premium quotations would be available for public inspection.

On September 12, HUD issued an amendment to the solicitation advising offerors that the solicitation was subject to Section 7(b) of the Indian Self Determination and Education Assistance Act, 25 U.S.C. § 450e(b) (1976), which requires that preferences in the award of contracts and subcontracts be given to Indian organizations and Indian-owned economic enterprises to the greatest extent feasible. Offerors were further informed that firms seeking to qualify as an Indian organization or an Indian-owned enterprise had to submit certain evidence establishing Indian ownership and the capability to perform the work required prior to or with the submission of their proposals.

Proposals were received from 16 offerors and were publicly opened on October 8. Many of the offerors proposed one or more alternative plans depending on 1) whether a non-cancellation or 120-day cancellation agreement was offered; 2) whether the premium was prepaid or paid in three annual installments; and 3) the amount of the deductible. In addition, most offerors did not offer all three types of coverage solicited. Only four of the 16 offerors proposed all three types of coverage. Furthermore, only two offerors offered a non-cancellation agreement and both of these offerors only did so with respect to fire and extended coverage. The record does not reflect the premiums quoted by the offerors for each type of coverage or each alternative plan.

Following the opening of the proposals, a HUD technical evaluation panel conducted a technical evaluation. Proposals were ranked on the basis of technical compliance (40 points), management capability (30 points), loss prevention and safety education program (20 points) and rate integrity (10 points). Apparently, the primary emphasis of the technical evaluation was directed towards the fire and extended coverage proposed by the offerors and the related loss prevention services. The five best qualified proposals, as determined by the technical evaluation panel, were as follows:

<u>Proposer</u>	<u>Score</u>	<u>3-Year Prepaid Fire Premium</u>	<u>Cancellation Clause</u>
Corroon	91.6	\$8,610,547	Non-can
Davis Agency <u>1/</u>	81.6	\$10,923,077	Non-can
First American Agency <u>1/</u>	71.2	\$ 9,350,000	120-day
Weisenburg Agency	70.6	\$ 9,054,656	120-day
Bundy Agency <u>1/</u>	56.75	\$10,953,765 <u>2/</u>	120-day

All of the best qualified proposals except Bundy's offered all three types of coverage.

HUD, in light of Corroon's technical rank and low cost, made award to Corroon on October 21 for all three types of coverage. On October 29 Marsh filed a protest with our Office. After filing a protest with HUD on October 23, Alexander also filed a protest with our Office on December 3. Both protesters essentially allege that they, rather than Corroon, were the low offeror and therefore were entitled to an award.

#### JURISDICTION

HUD contends that we do not have jurisdiction over the protests. HUD argues that the procurement was conducted by HUD in an advisory capacity on behalf of the Indian housing authorities and therefore did not constitute a procurement "by or for a Federal agency" under our Bid Protest Procedures, 4 C.F.R. Part 21 (1981). HUD states that the premiums payable under the Master Policy contract are paid by the Indian housing authorities out of project operating receipts such as tenant rental and homebuyer payments. HUD also argues that Indian housing authorities are not Federal entities and that their accounts are not subject to settlement by our Office. HUD further contends that it derives no direct benefit from the insurance.

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1/ Indian-owned firms or other Indian participation

2/ Premium for three annual installments - prepaid  
3-year premium not quoted.

### THE PROTESTS

Marsh and Alexander both maintain that they, rather than Corroon, were entitled to awards under the solicitation. Marsh essentially contends that it was entitled to the award of separate contracts for the fire and extended coverage and the public and automobile liability coverage because its offer for those coverages was low. Marsh argues that HUD improperly gave preemptive weight to the fact that Corroon offered non-cancelable fire and extended coverage. Marsh also argues that the evaluation conducted by HUD improperly penalized it for not offering all three types of coverage solicited because proposals for each type of coverage were not separately evaluated.

Alexander, on the other hand, maintains that it submitted the low offer for all three types of coverage solicited and that it was the only offeror which fully complied with the Indian preference clause of the solicitation. Like Marsh, Alexander argues that HUD improperly gave preemptive weight to the fact that Corroon offered non-cancelable fire and extended coverage. Alexander contends that the solicitation was vague and ambiguous in that it did not set forth evaluation standards for comparing proposals which offered non-cancellation agreements with those which did not. In addition, Alexander complains that no standards were included for comparing the various alternate deductible provisions permitted and for evaluating offers which proposed all three types of coverage and those which proposed less. Finally, Alexander argues that by selecting a higher priced offer, HUD afforded little or no weight to Alexander's compliance with the Indian preference clause of the solicitation.

### Timeliness of Protests

HUD contends that both protests are untimely because they essentially take exception to the solicitation's evaluation factors and they were both filed after the closing date for receipt of proposals. HUD argues that if the protesters had any questions regarding the importance HUD placed on non-cancelable coverage or the meaning of the Indian preference clause of the solicitation, then such questions should have been raised prior to the date for receipt of proposals. Since neither protester questioned these aspects, HUD argues that the protests are untimely under our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1). HUD further argues that in any event

We believe the protests are properly for consideration under our Bid Protest Procedures. Under those procedures, we consider protests by interested parties of the award or proposed award of a contract "by or for an agency of the Federal Government whose accounts are subject to settlement by the General Accounting Office," 4 C.F.R. § 21.1(a). We recently took jurisdiction over a protest concerning a procurement conducted by the Army on behalf of the North Atlantic Treaty Organization where appropriated funds were used initially to fund the contract, Security Assistance Forces & Equipment International, Inc., 60 Comp. Gen. 41 (1980), 80-2 CPD 308. We held that the involvement of the agency, which included at least the initial use of appropriated funds, was sufficient to constitute a procurement "by \* \* \* an agency of the Federal Government," even though the agency would ultimately be reimbursed for the expenditure. See Procurements Involving Foreign Military Sales, 58 Comp. Gen. 81 (1978), 78-2 CPD 349.

Here, the procurement was conducted by HUD--HUD issued the solicitation, evaluated the proposals, and awarded the contract. In addition, although HUD has represented that the premiums under the Master Policy were to be paid by the Indian housing authorities out of project operating receipts, we understand that this representation reflects HUD's view that the housing authorities are legally obligated to pay the premiums out of operating receipts and that the operating subsidy received by the Indian housing authorities under an ACC is not available to pay for insurance. Nonetheless, we also understand that the premiums under the Master Policy may actually be paid for out of appropriated funds and that HUD is later "reimbursed" for these expenditures through a complicated accounting procedure which reduces the operating subsidy the housing authorities would otherwise receive. Further, HUD states that in some instances development funds under the ACCs may be used to defray insurance costs for the first three years of the project. Although it appears that the Indian housing authorities may eventually repay HUD for these advances, at least initially there is an expenditure of appropriated funds to pay for a procurement conducted by a Federal agency performing a function over which we have settlement authority. Under these circumstances, we believe the procurement is properly viewed as subject to our protest procedures. Security Assistance Forces & Equipment International, Inc., supra.



the protests are without merit because the solicitation did not require that award necessarily go to the low offeror and the selection of Coroon was made in accordance with the evaluation factors of the RFP.

Alexander's complaints concerning the lack of specific evaluation criteria in the solicitation constitute protests against alleged solicitation improprieties, which were apparent prior to the date for receipt of initial proposals. Such protests, to be timely, must be filed either with the agency or our Office prior to the closing time. See 4 C.F.R. § 21.2(b)(1). Since Alexander's protest was first filed with HUD after the closing date those portions of its protest pertaining to the evaluation criteria are untimely. See Advance Machine Company, B-201954, February 19, 1981, 81-1 CPD 116. Other aspects of the two protests, however, concern the propriety of the evaluation itself rather than solicitation deficiencies and therefore are not untimely, although, as discussed below, some of the alleged improprieties in the evaluation are directly related to solicitation deficiencies.

#### Proposal Evaluation

Marsh argues that although the solicitation expressed a preference for non-cancelable coverage, it was improper for the agency to use that feature as its main factor in determining the award selection. Marsh further complains that since the solicitation contained no requirement that offerors submit proposals on all three types of coverage award should have been made to it as the low offeror on two of the three coverages solicited. Alexander, on the other hand, complains that it was not given sufficient credit in the evaluation for its proposed use of an Indian-owned firm.

Although the solicitation, which stated that award would be based on price and other factors, did not contain specific evaluation criteria, it did clearly state that the agency was seeking proposals with a non-cancellation agreement. It should have been evident to offerors that those proposing on a non-cancelable basis would receive a significant evaluation preference



and that HUD could conclude that an award to a single firm proposing all three coverages and offering a non-cancellation agreement with respect to the major type of coverage sought would be most advantageous.

Further, concerning Alexander's allegation that HUD afforded little or no weight to Alexander's compliance with the Indian preference clause of the solicitation, we have held that the preferential language "to the greatest extent feasible" confers broad discretionary authority on the contracting officer and does not require award to Indian-owned firms. See Department of the Interior--request for advance decision, 58 Comp. Gen. 160 (1978), 78-2 CPD 432. When our Office reviews agency determinations made pursuant to such authority, we will not disturb them unless they are arbitrary, unreasonable, or contrary to law or regulation. Department of the Interior--request for advance decision, supra. Here, we see no violation of these provisions since the weight in favor of a preferred offeror may be overcome by a superior offer with a significant technical differential, e.g., non-cancelable insurance coverage.

Although we find no basis for sustaining the protest, we are concerned about some obvious solicitation deficiencies. The solicitation issued by HUD appeared on its face to be issued as a formally advertised procurement. The solicitation provided that proposals would be opened in public and that award would be made to the responsible offeror whose offer was in the best interest of HUD and the Indian housing authorities "price and other factors considered." Yet, after publicly opening the proposals, HUD went through a detailed technical analysis and evaluated proposals in several categories, as set forth on page 4, supra, without having informed prospective offerors that these areas would be evaluated.

In this regard, we have held that when award is to be made based on "price and other factors," the term "other factors" refers to factors which are implicitly considered in any solicitation, such as ability to perform (responsibility), cost elements which will affect the overall cost of a contract to the Government, and any factors prescribed by law, regulation, or the public interest for the contracting agency's consideration, but does not adequately inform offerors that specific technical evaluation factors will be used. Joseph Legat Architects, B-190888, March 16, 1978, 78-1 CPD 214.

HUD's solicitation thus lacked any meaningful statement of the relative values of price and technical factors as well as any statement at all of the specific technical factors that HUD used to evaluate the proposals.

Despite these defects in the solicitation, we do not believe that the protesters had any basis to expect their proposals to have been evaluated in the manner they suggest. Further, the protesters did not notify the agency of any concerns regarding the solicitation, such as the lack of evaluation factors, prior to the date for receipt of initial proposals, but only complained after they did not receive the award. Therefore, while we are bringing the solicitation defects to the attention of the Secretary of HUD, we do not believe that the protesters were prejudiced by these defects and we see no reason to question the legality of the award for that reason.

The protests are denied.

*Milton J. Aocular*  
for Comptroller General  
of the United States